

Honorable Joseph C. Welty
Criminal Department Presiding Judge
Superior Court of Arizona, Maricopa County
175 W. Madison St.
Phoenix, AZ 85003
(602) 372-2537

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULE 7.6
OF ARIZONA RULES OF
CRIMINAL PROCEDURE

} Supreme Court No. R-12-0036

} Comment on Petition to Amend
} Arizona Rule of Criminal Procedure,
} Rule 7.6

Pursuant to Rule 28(D), Rules of the Supreme Court, Criminal Department Presiding Judge Joseph C. Welty, on behalf of the Superior Court of Arizona in Maricopa County (“Superior Court”), respectfully submits this Comment for the Court’s consideration.

The Superior Court opposes the petition because: (1) a portion of the petition is moot; (2) the petition proposes changes that would deprive judges of valuable discretion, including discretion to forfeit an appearance bond when the defendant fails to appear; (3) the petition is an improper attempt to use a rule amendment to rewrite a statute; and (4) the current timeframes for setting hearings are sufficient.

1. Revisions to A.R.S. § 13-3974

Arizona Revised Statute section 13-3974 governs the exoneration of appearance bonds. It currently states, “A surety may be relieved from liability on an appearance bond if the surety surrenders the defendant into the custody of the sheriff of the county in which the prosecution is pending and the sheriff reports the surrender to the court.” The use of the word “may” allows the court to exercise its discretion. For example, if the surety surrenders the defendant after

1 the date and time the court set for hearing, the court may decide the bond should
2 be forfeited in whole or part. In such a situation, the court could also take into
3 account the surety's efforts to locate and surrender the defendant, and the benefit
4 that confers upon the court, even if the surrender is after the date and time the
5 court set for hearing. Discretion allows the court to reach a just result.

6 In early 2013, following the filing of the petition on December 5, 2012,
7 House Bill 2231 rewrote A.R.S. § 13-3974. H.B. 2231 was signed by Governor
8 Brewer on April 29, 2013, and will go into effect on the general effective date.

9 While A.R.S. § 13-3974 currently provides courts with complete discretion
10 to exonerate a bond, the revised version of A.R.S. § 13-3974 will mandate
11 exoneration in three situations. Under the revised statute, the court "shall," with
12 certain conditions, relieve a surety from liability when: (1) the surety surrenders
13 the defendant to the county in which prosecution is pending on or before the day
14 and time ordered by the court; (2) the surety provides an affidavit that the
15 defendant is already in the custody of the county in which prosecution is pending
16 on or before the day and time ordered by the court; or (3) the defendant is
17 released or transferred to the custody of another government agency preventing
18 the defendant from appearing in court on the date and time ordered by the court.¹
19 The defendant must be in custody for any of the three mandatory exoneration
20 provisions to apply.

21 **2. A Significant Portion of the Petition is Moot**

22 The petition seeks to amend Rule 7.6(d), which addresses the
23 implementation of A.R.S. § 13-3974. The petition primarily focuses on
24 restricting the court's discretion in bond forfeiture and exoneration. To the extent
25 the petition seeks to require bond exoneration when the surety surrenders the
26

27 ¹ The petition's proposed amendments omit the explicit exceptions set forth in the
28 revised version A.R.S. § 13-3974(A)(3)(a) and (b) set to go into effect on the
general effective date.

1 defendant or the defendant is already in custody prior to the date and time
2 ordered by the court, the petition is moot due to the revisions to A.R.S. § 13-
3 3974. As explained below, however, the petition seeks to limit the court's
4 discretion beyond what the legislature requires and substantively change the
5 statute through rule amendment.

6 **3. Judicial Discretion**

7 The petition seeks to eliminate judicial discretion and mandate exoneration
8 without regard to whether the defendant misses the court hearing or is in
9 custody. Under the language proposed in the petition, the court would be
10 required to exonerate an appearance bond when the surety surrenders the
11 defendant *after* the defendant fails to appear at a hearing, *after* the court issues
12 an arrest warrant, but *before* the forfeiture hearing.

13 Thus, the rule amendment proposed in the petition would significantly alter
14 the bond system by requiring exoneration without regard to whether the
15 defendant appears or is in custody at the date and time for hearing. Such a result
16 is inconsistent with the purpose of appearance bonds, which are meant to ensure a
17 defendant's appearance in court. *See Fragoso v. Fell*, 210 Ariz. 427, 433, ¶ 17,
18 111 P.3d 1027, 1033 (Ariz. Ct. App. 2005) (“[T]he primary purpose of bail [is to]
19 to ensure a defendant's appearance to answer to the charges and submit to any
20 ultimate judgment of the court.”) (citing *Gusick v. Boies*, 72 Ariz. 309, 311, 234
21 P.2d 430, 431 (1951) (“[B]ail is exacted for the sole purpose of securing the
22 attendance in court of the defendant.”); *State v. Nunez*, 173 Ariz. 524, 526, 844
23 P.2d 1174, 1176 (Ariz. Ct. App. 1993) (“The primary purpose of an appearance
24 bond is to assure the defendant's presence at the time of trial.”)). The Superior
25 Court should retain its discretion to deny exoneration when the defendant fails to
26 appear at the hearing and is not in custody at the time of the hearing.

4. Improper Attempt to Use Rule Amendment to Revise Statute

The legislature has determined when a court is required to exonerate a bond, and has revised A.R.S. § 13-3974 to reflect that decision. The petition seeks to use a rule amendment to rewrite the legislation and further limit the court's discretion.

The petition seeks to expand a surety's right to exonerate the appearance bond beyond what the legislature has prescribed. The petition is an improper attempt to use a rule amendment to substantively revise a statute. *See gen. Sullivan v. Pulte Home Corp.*, 231 Ariz. 53, 290 P.3d 446 (Ariz. Ct. App. 2012) ("it would be improper to 'employ a court-adopted rule of procedure to alter the substantive effect of a statute . . .'" (quoting *Albano v. Shea Homes Ltd. P'ship*, 227 Ariz. 121, 127, ¶ 26, 254 P.3d 360, 366 (Ariz. 2011)); *State v. Birmingham*, 95 Ariz. 310, 390 P.2d 103, rehearing, 96 Ariz. 109, 392 P.2d 775 (Ariz. 1964) (procedural rules may not diminish or augment substantive rights). The legislature has rewritten A.R.S. § 13-3974 to grant sureties a right to have the appearance bond returned in three situations, all of which are triggered at the date and time the defendant is ordered to appear in court. The Court should not adopt a rule amendment that seeks to rewrite legislation to expand these three situations in disregard for whether the defendant appears or is in custody at the date and time set for hearing.

5. Timeframe for Hearings in Rule 7.6(c)(1)

Petitioner has not demonstrated any issue with the current timeframes for setting hearings pursuant to Rule 7.6(c). The petition proposes to amend 7.6(c) to include language stating, "[t]he court shall set the hearing not less than 60 days nor more than 120 days from the date of the issuance of the bench warrant." As to the 60-day minimum, the Superior Court should have the discretion to set a hearing within a reasonable time, and should not be required to wait 60 days for a

1 hearing. This proposed amendment to Rule 7.6(c) could increase delay and
2 restrict the court's ability to manage its docket.

3 As to the 120-day time limit, the proposed additional language of "nor
4 more than 120 days" for setting a hearing could be read as an attempt to preclude
5 the court from holding a hearing beyond 120 days. However, the 120-day time
6 provision is not jurisdictional, and forfeiture ordered after the time has passed
7 will be upheld unless the surety was prejudiced by the delay. *See, e.g., State v.*
8 *Jackson*, 184 Ariz. 296, 908 P.2d 1081 (Ariz. Ct. App. 1995); *State v. Rogers*,
9 117 Ariz. 258, 571 P.2d 1054 (Ariz. Ct. App. 1977). The current language in the
10 rule is sufficient, and petitioner has failed to demonstrate any issues that a change
11 in the language would alleviate.

12 For the foregoing reasons, the Criminal Department Presiding Judge of
13 the Superior Court in Maricopa County respectfully opposes the petition to
14 amend Rule 7.6.

15 Respectfully submitted this 16th day of May, 2013.

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Hon. Joseph C. Welty
Criminal Department Presiding Judge
Superior Court of Arizona, Maricopa County
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22 Original and six (6) copies delivered this
23 16th day of May, 2013 to:

24 Clerk of the Arizona Supreme Court
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